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SUPREME COURT, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1958.

No. 548

Albert J. Barta, John E. Barta and Charles K. Failing,
Petitioners,
vs.
Oglala Sioux Tribe of the Pine Ridge Reservation of South Dakota, and James Iron Cloud,
Respondents.

Claire Coomes and A. R. Davies,
Petitioners,
vs.
Oglala Sioux Tribe of the Pine Ridge Reservation of South Dakota, and James Iron Cloud,
Respondents.

John Glover and Merton Glover,
Petitioners,
vs.
United States of America,
Respondent.

Jack Lewis and Marvin Spracklin,
Petitioners,
vs.
United States of America,
Respondent.

Cyrus Porch and William Porch,
Petitioners,
vs.
United States of America,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

Hubbard F. Fellows, Counsel of Record, Rapid City, S. Dak.
John C. Farrar, Rapid City, South Dakota
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United States of America,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioners pray that a Writ of Certiorari issue to review the Judgments of the United States Court of Appeals for the 8th Circuit, entered in this cause.

OPINIONS BELOW

The cases were tried before a jury in the District Court. No written opinion thereon was made.

The opinion of the Court of Appeals has not been reported. A copy is appended as Appendix I, pp 1 thru 9.

JURISDICTION

The judgments of the Court of Appeals were entered October 15, 1958; copies are appended as Appendix II, pp 1 thru 5.

Jurisdiction to issue the Writ rests on Title 28, USCA 1254(1).

QUESTIONS PRESENTED

1. Whether under rule 73(a), Title 28, USCA, the time for appeal commenced to run from entry of judgment in favor of the respondent, the Oglala Sioux Tribe, on October 10, 1957, or from the entry of order on October 30, 1958, denying petitioners Albert J. Barta, John E. Barta, and Charles K. Failing's and petitioners Clair Coomes and A. R. Davies' motions to set aside verdict and judgment entered thereon.

2. Whether the Federal District Court had jurisdiction of action commenced by the respondent Oglala Sioux Tribe to collect a tax levied against A. J. Barta et al and petitioners Clair Coomes et al by virtue of a resolution made by the tribal council pursuant to authority contained in tribal constitution adopted under provisions of Title 25, Section 476, USCA, wherein jurisdiction is alleged under Title 28, USCA 1331, as actions arising under the laws of the United States and the matter in controversy exceeding $3,000.00.

3. Whether the Federal District Court obtained jurisdiction of actions commenced for the United States of Ameri-

ca on behalf of the Oglala Sioux Tribe for the collection of a tribal tax levied against petitioners, by reason of the provisions contained in 28 USCA 1345; that this is an action commenced by the United States of America.

4. Whether provisions of the 5th or 14th amendment of the Federal Constitution protecting against deprivation of life, liberty or property without due process of law applies to resolution of tribal council levying a tax upon petitioners.

5. Whether the tribal tax levied by the Oglala Sioux Tribe pursuant to the provision of a tribal constitution adopted and approved under 25 USCA 476 is a valid tax.

CONSTITUTIONAL PROVISIONS AND STATUTES

The Constitutional provisions, statutes, and resolutions involved are set out in Appendix III.

STATEMENT OF CASE

A. The basic facts.

That petitioners were at all times material hereto:

Grazing cattle upon trust-allotted land, tribal land, and other land owned by the United States of America.

They were residents of the State of South Dakota, residing and owning land within the boundaries of the Pine Ridge Indian Reservation in South Dakota, except petitioners A. J. Barta, John E. Barta, and Charles K. Failing, who reside in Custer County, South Dakota, adjacent to the Pine Ridge Indian Reservation.

The Oglala Sioux Tribe was organized and adopted a Tribal Constitution under the Indian Reorganization Act, June 18, 1934, 48 Stat. 487, 25 USCA 476.

The petitioners used trust-allotted land and tribal land

on the Pine Ridge Indian Reservation, title to which is held by the United States of America in trust, and other land belonging to the United States of America for grazing purposes by virtue of grazing permits issued and approved under the authority of the Secretary of the Interior of the United States of America.

The Oglala Sioux Tribal Council, by resolution, levied a tax on nonmembers of the tribe of Three Cents (3c) per acre per annum for grazing trust-allotted land and tribal land, and Fifteen Cents (15c) per acre per annum for using dry farm land and hay land; and further, provided that the tax be paid to the Treasurer of the United States for the Oglala Sioux Tribe.

The resolution was approved by the Bureau of Indian Affairs of the Pine Ridge Agency and was submitted to the Secretary of the Interior, who permitted it to go into effect pursuant to the provisions of the constitution of the Oglala Sioux Tribe.

No member of the Oglala Sioux Indian Tribe is required to pay any tribal tax for any purpose.

More than 33⅓ of the trust-allotted and tribal lands are used by members of the tribe under grazing permits issued and approved under the authority of the Secretary of the Interior.

Only Indians are or can be members of the Oglala Sioux Tribe.

The members of the Oglala Sioux Tribe are all citizens of the United States, and those members of the tribe living within the boundaries of the Pine Ridge Indian Reservation are residents and citizens of the State of South Dakota.

The tribe does not provide or maintain any schools, roads, public utilities, bridges, sidewalks, paving, or fire protection.

The tribe does not provide any health or welfare services for the use or benefit of nonmembers of the tribe. Both the Federal and State governments provide and maintain schools, roads, bridges, police protection, health and welfare services on the Pine Ridge Indian Reservation.

Monies are appropriated annually by the Congress of the United States for the purposes of tribal government and law enforcement.

The petitioners refused to pay the tribal tax levied for the period commencing November 1, 1953, five actions were commenced to recover the taxes alleged to be due; petitioners answered, and by way of defense, denied the jurisdiction of the District Court, and further alleged by way of defense that the tax was illegal and void.

Two of the actions were brought in the name of the respondents, the Oglala Sioux Tribe; and the other three actions were brought in the name of the United States of America on behalf of the Oglala Sioux Tribe. The actions were consolidated for purpose of trial by jury. Trial was had on September 17 and 18, 1957. Appropriate motions for directed verdict were made by petitioners at the close of respondent's evidence, and again at the close of all the evidence. On motions by respondent at the close of all the evidence, the Court directed verdicts in favor of the respondent for the amount of the taxes severally alleged to be due, and verdicts thereupon were filed September 18, 1957. (R., pp. 75, 78, 81, 83, 86.)

On September 26, 1957, petitioners' motions to set aside the verdict and judgments entered thereon in favor of respondent and to enter judgments in favor of petitioners notwithstanding the verdict or in the alternative for a new trial were made and filed. (R., pp. 75, 78, 81, 83, 86.)

On September 26, 1957, order staying execution on judgments pending hearing on motions for judgment not-

withstanding verdict were made and entered. (R., pp. 75, 78, 81, 83, 86.)

On September 27, 1957, money judgments were entered and filed in the three actions commenced by the United States of America on behalf of the Oglala Sioux Indian Tribe. (R., pp. 81, 84, 86.)

On October 2, 1957, orders were made and filed by respondent United States of America on behalf of the Oglala Sioux Indian Tribe to hear petitioners' motions for judgment notwithstanding the verdict on October 10, 1957. (R., pp. 81, 84, 86.)

On October 8, 1957, stipulation and order were filed by respondent Oglala Sioux Tribe, setting October 10, 1957, to hear petitioners' motion for judgment notwithstanding the verdict. (R., pp. 75, 78.)

On October 10, 1957, hearing was held on all five of petitioners' motions for judgment notwithstanding the verdict; and the Court, having made a statement to counsel, announced, "The motions will be denied."

On October 10, 1957, the Clerk's docket in each action revealed the following entry:

> "Ent. hearing on motion for judgment notwithstanding verdict, etc.—denied." (R., pp. 76, 79, 81, 84, 86.)

Following the foregoing entry, the Clerk's dockets reveal in the two actions commenced by respondent Oglala Sioux Tribe, the entry of money judgments. (R., pp. 76, 79.)

On October 11, 1957, orders were entered in the Clerk's docket denying petitioners' motion for judgment notwithstanding verdict or in the alternative for a new trial. Notice of entry of the orders, together with the date of entry were sent by the Clerk to petitioners in those actions commenced by the United States of America on behalf of the tribe. (R., pp. 81, 84, 86.)

On October 30, 1957, orders were entered in the Clerk's docket denying petitioners' motion for judgment notwithstanding verdict or in the alternative for a new trial. Notice of entry of the orders, together with the date of entry were sent by the Clerk to petitioners in those actions commenced by the respondent tribe. (R., pp. 76, 79.)

Notices of appeal were filed in all five actions by petitioners on November 29, 1957. (R., pp. 76, 79, 81, 84, 86.)

BASIS OF FEDERAL JURISDICTION

Federal jurisdiction in the Court of first instance is based upon the provisions of Section 1331, Title 28, USCA and Section 1345, Title 28, USCA.

ARGUMENT

The Court of Appeals Erred in Dismissing Petitioners' Appeals

Rule 73(a), Title 28, USCA (Appendix III) contemplates both an order and its entry in the docket where a timely motion is made to set aside the verdict and the judgment entered thereon and to enter judgment for petitioners or in the alternative for a new trial.

Healy v. *Pennsylvania Railroad Company* (CCA 3, 1950), 181 Fed. 2d 934.

Re: *D'Arcy* (CCA 3, 1944), 142 Fed. 2d 313.

The fact that judgment was entered after making the motion for judgment notwithstanding the verdict or in the alternative for new trial and the Court's announcement denying the motion does not fulfill the requirements under the rules that a definitive order denying motion must be made and entered in order to start the time running for appeal from the judgment.

Partridge v. Presley (CAA DC, 1951), 189 Fed. 2d 345, Cert. denied, 342 US 850 (1951)

On September 18, 1957, verdicts against the petitioners were entered by the Clerk. On September 26, motions to set aside the verdicts and judgments rendered thereon were entered by the Clerk. On September 27, judgments in actions commenced by the United States of America on behalf of the tribe were entered by the Clerk. On October 10, judgments on behalf of respondent Oglala Sioux Tribe were entered by the Clerk.

On October 11, orders denying the motions in those actions commenced by the United States of America on behalf of the tribe were entered by the Clerk and notice of such entry and the date thereof was given to the petitioners as provided in Rule 77(b), Title 28, USCA. (Appendix III.)

On October 30, 1957, order denying the motions in those actions commenced by respondent Oglala Sioux Tribe were entered by the Clerk and notice of the entry of the orders and the date thereof was given to the petitioners by the Clerk as provided for by Rule 77(b), Title 28 USCA. (Appendix III.)

No other orders denying petitioners' motions to set aside the verdicts and judgments rendered thereon or in the alternative for a new trial were at any time entered or filed by the Clerk of the District Court.

The Court below relies essentially on the decision of this Court as set forth in *United States* vs. *Schafer Brewing Company*, 356 US 227.

There is no similarity in the fact situation existing between that case and these cases. The rule announced in the *Schafer* case (supra) has no application in these cases. Certainly, it should not be permitted to stand as authority for the decision in the Court below. To do so under the facts in

these cases will greatly weaken the rules of civil procedure, create confusion, and conflict with decisions in other circuits. Justice and good sense requires settlement by an authoritative decision of this Court.

The Court of Appeals Erred in Sustaining the Jurisdiction of District Court.

Respondent Oglala Sioux Tribe commenced two actions in August, 1956. Petitioners Barta et al and Coomes et al made motions to dismiss the Complaints on the grounds: That the District Court lacked jurisdiction. (R., pp. 15.)

The District Court denied the motions and petitioners answered, renewing their resistance to jurisdiction of District Court by way of defenses set forth in the Answer.

The jurisdiction of the District Court was based on the proposition that the actions arose under the laws of the United States and exceeded $3,000.00 in value, under provisions of 28 USCA 1331. (Appendix III.)

It has been repeatedly affirmed by this Court that an action to arise under the laws of the United States must, as an essential element of plaintiff's cause of action, involve a right or immunity created by the Constitution or laws of the United States; and the right or immunity must be such that it will be supported if the Constitution or law of the United States is given one interpretation or effect and defeated if it receives another.

Gully v. *First National Bank* (1936), 57 S. Ct. 96, 299 US 109, 81 L. Ed. 70.

The contention of the respondent in the Court below was that the Oglala Sioux Tribe was organized and adopted a duly approved constitution under the provisions of 25 USCA 476. (Appendix III.) That, pursuant to the authority contained in the tribal constitution, the Oglala Sioux Council adopted a resolution levying a tax on all nonmem-

bers of the tribe using trust-allotted land and tribal land on the Pine Ridge Reservation for grazing or farm purposes; and that therefore the action to collect the tribal tax by the tribe arose under the laws of the United States, giving the District Court jurisdiction.

The petitioners contend that an action arising under tribal law is not one arising under the laws of the United States, and that the District Court did not have jurisdiction. This position is amply supported by the *Gully* case (supra) and in the case of *Martinez* v. *The Ute Tribe*, 151 Fed. Supp. 476, affirmed by the Circuit Court of Appeals, 10th Circuit, 249 F. 2d 915 (CCA Colo.)

The District Court's decision on the jurisdictional question is in direct conflict with a decision of the Circuit Court, Eighth Circuit.

In the case of *Crabtree* v. *Madden* (CCA 8th Circuit) (1893) 54 Fed. 426, wherein the Court considered the specific question of the right of the Indian tribe to collect a tax imposed on a nonmember by way of an action in Federal Court, the Circuit Court conclusively disposed of the jurisdictional issue in these words.

> "The conviction that if Congress had intended to confer on the Court in the Indian Territory a jurisdiction so extraordinary in its character and so far reaching in its effect as here claimed, it would not fail to clearly and unmistakably express that intention has forced us to the conclusion that it never did intend to confer that jurisdiction."

Jurisdiction of the District Court in the cases commenced by the United States on behalf of the Oglala Sioux Tribe is based upon the provisions of Title 28, USCA 1345, to the effect that the District Court shall have original jurisdiction over all civil actions commenced by the United States of America.

It has been repeatedly affirmed by this Court that there are certain limitations on the United States wherein it commences an action in a representative capacity. If there does not appear any obligation on the part of the United States to the public, or to any individual, or any interest of its own, it can no more sustain such an action than any private person could under similar circumstances.

United States v. *San Jacinto Tin Company*, 125 US 273, 286 (1888).

In numerous decisions it has been held that the United States as the plaintiff litigant has no greater or different right than any private litigant.

The United States v. *Fort Smith and W. R.*, 195 Fed. 211.

It must be remembered that these actions are not equity actions, but are legal actions for the collection of a tax. Normally taxes are not collected by judicial action. The Court would be hard-pressed to find jurisdiction over the subject matter of this type of action.

The Circuit Court for the Eighth Circuit considered the matter in *Crabtree* v. *Madden* (supra), and said: Before the jurisdiction of the Court to entertain such an action could be maintained, it must be clearly established that Congress has granted the Federal Court concerned the authority to entertain and determine actions of this character, because that court, in common with all the Federal Courts, is limited in its jurisdiction to the cases and proceedings which Congress has granted it authority to consider and act upon.

The Court further said:

"An action at common law, then, is not the usual method of enforcing the collection of a tax, even in the courts of the sovereignty imposing it, nor is it generally the province of the courts of one state to enforce the revenue laws of another."

The decision of the court below has, in the words of the *Madden* case (supra) demonstrated:

> "The extraordinary spectacle . . . of a political society, authorized to impose taxes for the support of its government and the protection of its subjects, appealing to the courts of another sovereignty to enforce the collection of taxes against the persons and property within its own territory."

No tribal taxes are due the United States by these petitioners. The money derived from these taxes would belong to the tribe, not the United States. The United States has no pecuniary interest in them; and, having no pecuniary interest in the tax or its recovery, the Court would be without jurisdiction.

The United States for the Use of Edward Hynes Lumber Co. v. *Henderlong et al*, 102 Fed. 2.

The tax money held by the United States would be held by the Government as trustee; and the Courts have held that when the United States holds money as a trustee, it cannot bring an action to recover it.

United States v. *Stewart*, 30 Fed. Supp. 200.

The position taken by the court below, that the United States has a pecuniary interest in the tax because it is used to supplement funds which the United States devotes to the purpose of tribal government, is in direct conflict with the decisions of this court and the circuit courts.

United States v. *Standard Oil Co. of California*, 332 US 301, 67 S. Ct. 1604, 91 L. Ed. 2067

Gartner v. The United States, 166 F. 2d 728.

The determination of the court below, that jurisdiction arises because of the obligation and interest of the United States in the Indian as a ward and because of its own interest in the trust property and the tax involved, presents compell-

ing and important reasons for the granting of the Writ. The Court, by such broad and far-reaching interpretation of jurisdiction under 28 USCA 1345 has given the Executive branch of the Government unlimited power to endow the Federal Courts with jurisdiction, a power formerly held only by Congress. The court below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The Court of Appeals erred in holding that the Tribal Tax was valid.

The court below states that the Oglala Sioux Tribe possesses the power of taxation, which is an inherent incident of its sovereignty.

This is in direct conflict with this court's decision in the case of *United States* vs. *Kagama*, 118 US 375, 30 L. Ed. 228, 6 Sup. Ct. 1109, wherein the court said:

> " . . . These Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the Government of the United States or of the states of the Union. There exists within the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies with limited legislative functions, but they are all derived or exist in subordination to one or the other of these . . . "

Unless the powers of sovereignty exercised by the Oglala Sioux Tribe are of such nature as to give them the character of a state in this Union, there is not conferred on it the right of taxation, as this great right, attendent upon sovereignty, belongs in this country either to the Federal Government or the government of the states.

Cherokee Nation v. *Kansas Railway Company*, 33 Fed. 900.

The court below decided that the tribe, by provisions of its treaty with the United States, has power to provide for the admission of nonmembers of the tribe on to the reservation; having such power, it has the authority to impose restrictions on the presence of nonmembers within the reservation.

The petitioners are using trust-allotted land, tribal land, and other land owned by the United States by virtue of grazing permits issued under authority of the Secretary of the Interior. (R., pp. 51-53.)

To hold that the tribe has authority to impose restrictions on the presence of nonmembers within the reservation is to say that the authority of the United States and its officers who administer the Indian affairs on the reservation are subject to the greater authority of the tribe.

Such is not the fact and directly conflicts with decisions of this court and with Federal statutes.

Choate vs. *Trapp*, 224 US 665, 671 (1912).
25 USCA 2. (Appendix III.)
25 USCA 9. (Appendix III.)
25 USCA 262. (Appendix III.)
25 USCA 400a. (Appendix III.)
25 USCA 466. (Appendix III.)

The tribal tax is void because it is arbitrary, capricious, discriminatory, serves no public purpose, imposes the entire cost of tribal government on nonmembers of the tribe; no benefits are derived by the petitioners from the tax; it is an unreasonable classification based on race and color; does not apply alike to same classes and occupations, denies petitioners equal protection of the law, and lacks uniformity. No provision is made for any hearing, notice, or other opportunity to adjust or correct the amount of the tax; and is an attempt to enrich the tribe at the expense of these peti-

tioners and denies the petitioners qual protection of the law and of their property without due process. (R., pp. 31 through 34.)

The decision of the court below, affirming the District Court, is in direct conflict with the decisions of this Court.

Union Refrigeration Transit Co. vs. *Kentucky*, 199 US 194, 50 L. Ed. 150, 16 S. Ct. 36.

Turner vs. *Wade*, 254 US 64, 65 L. Ed. 134, 41 S. Ct. 27.

American Sugar Refining Co. vs. *State of Louisiana*, 179 US 89, 45 L. Ed. 102, 21 S. Ct. 433.

United States vs. *Butler* 297 US 1.

The decision of the Court below holds that the tribal tax does not violate the Federal Constitution, for the reason that tribal legislation is not subject to many prohibitions, including the Bill of Rights of the Federal Constitution, which are limitations, only, on the power of the Federal Government. Other provisions limit the activities of state sovereignty, or of the Federal or state government, *and, hence, are not applicable to Indian Tribes which are not creatures of either the Federal or state government.* (Emphasis supplied.)

The decision of the Court below also holds that the provisions of the Federal Constitution protecting personal liberty and property rights do not apply to tribal action.

The prohibitions of the Federal Constitution contained in the Fifth Amendment are a limitation on the powers of the Federal Government, the protection of which is afforded to Indian tribes and Indians living on the Indian reservation, but is denied to white American citizens who live on the reservation.

If the State or Federal Government, or any subdivisions thereof should adopt legislation levying taxes solely on non-members of the white race, such legislation would be im-

mediately and forthwith declared by this Court to be unconstitutional.

Yet, the Court below has held in effect that, when the Oglala Sioux Tribal Council composed of American citizens adopts legislation levying a tax solely on nonmembers of the Indian Tribe, such Legislation is entirely legal and the United States has not only the right but the duty to collect it for the Indian tribe through the courts of the United States.

The Court below has in effect said that the Oglala Sioux Tribe is endowed with the same attributes of sovereignty as the Federal or state government with respect to the power of taxation, and is not subject to any limitations as to the exercise thereof by reason of any provisions contained in the Federal or state constitutions.

The Court below also held that taxation of nonmembers of the tribe was not invalid as taxation without representation.

An analogy is drawn between the tribal tax and a local sales tax imposed on residents and nonresidents alike as valid "taxation without representation"—or that property, both real and personal, of nonresidents may be lawfully subject to the tax laws of the state in which they are situated.

The error occurs in the first analogy in that the tribal tax is not imposed on residents and nonresidents alike, but is imposed only on nonmembers.

The second analogy refers to resident and nonresident. That is not the case here. This is taxation based on nonmembership in the tribe. If it were merely residency or nonresidency, the Oglala Sioux Indians using the trust land would be subject to the tax. Surely, the court below does not sustain any proposition that a state could tax only noncitizens of the state and completely relieve the citizens of the state of any obligation to pay taxes.

The fatal defect in the argument is that here we have a situation in which both the Oglala Sioux Indians, who comprise the Oglala Sioux Tribe, and the nonmembers are residents and citizens of the State of South Dakota and the United States. However, the tribal government excludes all white people from any participation in their government, not on residency, but on account of race and not being born an Oglala Sioux Indian.

The true analogy would be where the State of South Dakota passed legislation taxing only Oglala Sioux Indians and permitted only *nonmembers* of the Oglala Sioux Tribe to participate in the state government.

The imposition of this tribal tax without consent of petitioners is no different than the taxes imposed upon the Colonies by King George III and his Parliament.

Such taxation has always been abhorrent to the government and courts of this country.

McCulloch vs. *Maryland* (1 Wheat. US 316), (4 L. Ed. 1).

CONCLUSION

The questions involving jurisdiction of the Federal Court, which are presented by this petition, are important and unusual. The decision of the court below and the District Court appear to have enlarged the jurisdiction of the court without action by Congress and upon such uncertain authority so as to call for an authoritative opinion of this court as to the limiting factors involved where no express statutory provisions are relied on covering the subject matter of the action.

The questions of taxation are always serious ones. And, when the power of taxation can be exercised by an organization, composed of American citizens, that is neither a state

nor a subdivision of a state nor a territory nor a subdivision of the Federal Government, without any of the protections guaranteed by the Federal or state constitution, the powers of this court should be exercised to clearly define the limits of such activities.

The legal, social, and economical problems involved in these actions have been created more by judicial opinion, which fails to recognize the dynamic growth, change, and effects of citizenship and relationship arising out of race and color, than by any statutes or laws created and passed by Congress. Decisions based on political, social, and economic conditions as they existed fifty to one hundred years ago have been applied to a situation existing today, without any recognition of the changes which have occurred in the legal, political, social, or economic relations of the parties concerned. Problems of such importance are entitled to an authoritative decision of this court defining the legal relations, obligations, and rights of these petitioners, with reference to the subject matter involved.

Respectfully submitted,

Hubbard F. Fellows

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Robert W. Gunderson

Attorneys for Petitioners

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APPENDIX I

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 15,967

Albert J. Barta, John E. Barta and Charles K. Failing,

Appellants,

vs.

Oglala Sioux Tribe of the Pine Ridge Reservation of South Dakota, and James Iron Cloud,

Appellees.

No. 15,968

Claire Coomes and A. R. Davies,

Appellants,

vs.

Oglala Sioux Tribe of the Pine Ridge Reservation of South Dakota, and James Iron Cloud,

Appellees.

No. 15,969

John Glover and Merton Glover,

Appellants,

vs.

United States of America,

Appellee.

No. 15,970

Jack Lewis and Marvin Spracklin,

Appellants,

vs.

United States of America,

Appellee.

No. 15,971

Cyrus Porch and William Porch,

Appellants,

vs.

United States of America,

Appellee.

Appeals from the United States District Court for the District of South Dakota.

[October 15, 1958.]

John C. Farrar (Gunderson, Farrar & Carrell were with him on the brief) for Appellants.

Richard Schifter (Harold R. Hanley, Daniel M. Singer, Strasser, Spiegelberg, Fried & Frank, and Hanley, Costello & Porter, were with him on the brief), for Appellees in Nos. 15,967 and 15, 968.

Robert S. Griswold, Jr., Attorney, Department of Justice, (Perry W. Morton, Assistant Attorney General, Clinton G. Richards, United States Attorney, Lyle E. Cheever, Assistant United States Attorney, and S. Billingsley Hill, Attorney, Department of Justice, were with him on the brief), for Appellees in Nos. 15,969, 15,970 and 15,971.

Before GARDNER, Chief Judge, and VOGEL and MATTHES, Circuit Judges.

GARDNER, Chief Judge.

Appellants at all times here material were lessees of certain tribal trust lands in the Pine Ridge Indian Reservation located within the geographical boundaries of the State of South Dakota. The Pine Ridge Indian Reservation is the home of the Oglala Sioux Tribe of Indians. The Oglala Sioux Tribal Council by resolution levied a license tax on non-members of the tribe leasing trust lands on the reservation, of three cents per acre per annum for grazing land and fifteen cents per acre per annum for farm land. Appellants were lessees of tribal trust lands. Having failed and refused to pay the tax so levied during the period commencing November 1, 1953, these five actions were brought to recover the taxes alleged to be due. Two of the actions were brought in the name of the Oglala Sioux

Tribe while the other three were brought in the name of the United States of America on behalf of the Oglala Sioux Tribe. The actions were consolidated for purposes of trial and at the close of all the evidence, on motions of plaintiffs, the court directed verdicts in favor of the plaintiffs for the amounts of the taxes severally alleged to be due by appellants. We shall hereinafter refer to appellants as defendants.

Defendants then moved for judgments notwithstanding the verdicts. Following the argument on which, the court announced, "The motions will be denied", and thereupon, pursuant to the verdicts as so directed, the court on October 10, 1957, entered separate money judgments against the defendants named in the actions brought by the tribe.

In the two actions brought by the tribe notices of appeal from the judgments entered October 10, 1957, were filed November 29, 1957, or twenty days beyond the time provided in Rule 73(a), Federal Rules of Civil Procedure. Rule 73(a), Federal Rules of Civil Procedure, requires that notice of appeal, except where the United States is a party, shall be filed within thirty days from entry of the judgment appealed from. When, on October 10, 1957, the court entered money judgments, appropriate docket entries were made on the same day. On October 30, 1957, the clerk entered an order recapitulating the denial of defendants' motions for judgments notwithstanding the verdicts and for new trials as pronounced and entered on October 10, 1957. In resisting the motions to dismiss these two appeals defendants urge that the formal order entered by the clerk on October 30, 1957, was in fact the judgment of the court and hence their notices of appeal were filed within the time limited by Rule 73(a), Federal Rules of Civil Procedure. We think this contention untenable. *United States* v.

Schaefer Brewing Co., 356 U.S. 227. In *United States* v. *Schaefer Brewing Co.*, supra, the Supreme Court, speaking through Mr. Justice Whittaker, said:

> "Therefore, when, as here, the action is for money only * * * it is necessary to determine whether the language of the opinion embodies the essential elements of a judgment for money and clearly evidences the judge's intention that it shall be his final act in the case. If it does so, it constitutes his final judgment * * *. When all of these elements clearly appear final judgment has been both pronounced and entered, and the time to appeal starts to run under the provisions of Rule 73(a)."

It is to be noted in this connection that the notices of appeal describe as the judgments appealed from the judgments entered October 10, 1957. If, as contended by defendants, the orders entered by the clerk on October 30, 1957, were in fact the judgments of the court then those judgments have not been appealed from. Filing of notice of appeal within the time prescribed is jurisdictional. *St. Luke's Hospital* v. *Melin*, 8 Cir., 172 F.2d 532; *Marten* v. *Hess*, 6 Cir., 176 F.2d 834. Appeals in Nos. 15,967 and 15,968 are therefore dismissed.

There remains for consideration the issues raised by defendants in the actions brought by the United States on behalf of the Oglala Sioux Tribe. In seeking reversal in Nos. 15,969, 15,970 and 15,971 defendants in substance contend: (1) that the Federal District Court was without jurisdiction over a suit by the United States to collect a tax imposed by a tribe organized under Federal law on the use of Indian trust lands by non-members of the tribe, and (2) that a tax on the use of Indian trust lands imposed by an Indian tribe on non-members of the tribe violates the Fifth and Fourteenth Amendments to the Constitution.

V

Section 1345, Title 28, U.S.C. in part provides that "the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States". Of course, if there is no obligation on behalf of the United States to the public or any individual, or it has no interest of its own, it could not maintain such an action. *United States* v. *San Jacinto Tin Co.*, 125 U.S. 273. Where however, the government has an obligation to its Indian wards as well as an interest of its own in the trust property and the tax involved, it may maintain the action. *Heckman* v. *United States*, 224 U.S. 413; *United States* v. *Sandoval*, 231 U.S. 28; *United States* v. *Candelaria*, 271 U.S. 432; *United States* v. *Board of Com'rs. of Grady County, Okla.*, 10 Cir., 54 F2d 593. In *Heckman* v. *United States*, supra, it is said:

> "During the continuance of this guardianship, the right and duty of the nation to enforce by all appropriate means the restrictions designed for the security of the Indians cannot be gainsaid. While relating to the welfare of the Indians, the maintenance of the limitations which Congress has prescribed as a part of its plan of distribution is distinctly an interest of the United States. A review of its dealings with the tribe permits no other conclusion. Out of its peculiar relation to these dependent peoples sprang obligations to the fulfillment of which the national honor has been committed. 'From their very weakness and helplessness, so largely due to the course of dealing of the Federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress and by this court, whenever the question has arisen.'

United States v. *Kagama*. 118 U.S. 375, 384, 30 L.ed. 228, 231, 6 Sup. Ct. Rep. 1109.

"This national interest is not to be expressed in terms of property, or to be limited to the assertion of rights incident to the ownership of a reversion or to the holding of a technical title in trust."

In *United States* v. *Board of Com'rs. of Grady County, Okla.*, supra, in sustaining the right and authority of the United States to maintain an action on behalf of an Indian tribe, the court said:

"There was no tenable objection to the general jurisdiction of the District Court. It was expressly conferred by title 28, Sec. 41, subd. 1, of the U. S. Code, 28 USCA Sec. 41 (1), in providing that the District Courts shall have jurisdiction, "first, of all suits of a civil nature, at common law or in equity, brought by the United States. * * *' "

Here there was a right of the Indians to levy this tax on non-members of the tribe using these lands. Thus in Iron Crow v. Oglala Sioux Tribe of Pine Ridge Res., 8 Cir., 231 F2d 89, we said:

"Inasmuch as it has never been taken from it, the defendant Oglala Sioux Tribe possesses the power of taxation which is an inherent incident of its sovereignty. The tribe has seen fit to give orderly implementation to that power through the adoption of a constitution which, among other things, has specifically provided for the levy of taxes. Such action was taken in accordance with the provisions of the Indian Reorganization Act, 1934, 48 Stat. 987, 25 U.S.C.A. Sec. 476.

"We conclude from the original precept of tribal

sovereignty and the fact that the power of the Oglala Sioux Tribe to impose the tax or license in question has not been pretermitted by any federal statute or agency ruling thereunder, but, to the contrary, has been implemented by the Indian Reorganization Act, supra, that such power still exists."

It was the right, if indeed not the duty, of the United States to take whatever action might be necessary to enforce this right and thus protect its wards. Quite aside from this, however, the United States had an interest of its own in the trust property and the tax involved. Legal title to these lands was retained in the United States. Having in mind that we have sustained the right of the Indian tribe to levy the so-called tax here involved, it will be observed that the resolution providing for the tax also provided for payment of fees to the Treasurer of the United States. The tax, when collected, is devoted to tribal governmental purposes, supplementing funds which the United States devotes to that purpose, and to that extent the United States has a pecuniary interest in the collecion of his tax. We are satisfied that the government has a maintainable interest in these actions, entitling it to prosecute them in its own name even though the tribe may also maintain such actions. *Creek Nation* v. *United States*, 318 U.S. 629.

It is argued that even though the tribe may have the statutory authority to levy such a tax as is here involved, nevertheless the tax here levied is violative of the Constitutional rights of defendants. The tribe by provisions of its treaty with the United States has power to provide for the admission of non-members of the tribe onto the reservation. Having such power, it has the authority to impose restrictions on the presence of nonmembers within the res-

viii

ervation *Buster* v. *Wright*, 8 Cir., 135 F. 947. The contention is that the levy of the tax was violative of certain of defendants' Constitutional rights under the Fifth and Fourteenth Amendments to the Constitution. The Fourteenth Amendment places limitations on legislative actions by the states. *Slaughter House Cases*, 83 U.S. 36. The Indian tribes are not, however, states and these Constitutional limitations have no application to the actions, legislative in character, by Indian tribes. Neither may the Fifth Amendment be invoked as against any legislative action of the Indian tribes. *Talton* v. *Mayes*, 163 U.S. 376. The matter is quite fully discussed in Cohen's Handbook of Federal Indian Law (1942) at page 124 where it is said:

> "Where, however, the United States Constitution levies particular restraints upon federal courts or upon Congress, these restraints do not apply to the courts of legislatures of the Indian Tribes. [United States v. Seneca Nation of New York Indians, 274 Fed. 946 (D.C.W.D.N.Y., 1921); Memo. Sol. I.D., Aug. 8, 1939 Lower Brule Sioux).] Likewise, particular restraints upon the states are inapplicable to Indian Tribes."

And at page 181 it is said:

> "Many important prohibitions, including the Bill of Rights of the Federal Constitution, are limitations only on the power of the Federal Government. Other provisions limit the activities of state governments only, or of the federal and state government, and hence are inapplicable to Indian tribes, which are not creatures of either the federal or state governments. (Citing cases)
>
> "The provisions of the Federal Constitution protecting personal liberty and property rights do not

apply to tribal action. [Op. Sol. I. D., M. 27810, Oct. 23, 1934; Op. Sol. I. D., M.27810, Dec. 13, 1934.] In *Talton* v. *Mayes* [163 U.S. 376 (1896), discussed in Memo. Sol. I. D., Aug. 8, 1938], the court held that the Fifth Amendment of the Federal Constitution, requiring indictment by a grand jury in most infamous crimes, does not apply to the acts of a tribal government."

And at page 267 it is said:

"It would seem that the tribal taxing power is not subject to limitations imposed upon state or federal legislation by the Federal Constitution."

The Constitutional validity of a tax similar to the tax here involved was considered in *Morris* v. *Hitchcock*, 194 U. S. 384. In the course of the opinion in that case the court said the levying of the tax "was not the exercise of arbitrary power, as claimed, and that neither the act nor the regulations in any respect violate the Constitution of the United States".

It is finally argued that the tax is violative of defendants' rights in that it constitutes taxation without representation. If it be conceded that the act of the tribe in levying this tax constitutes taxation without representation that alone is certainly not fatal. The taxability of property is not dependent upon the residence of the owner of the property. The property rights of an alien or nonresident are taxable the same as the property of residents who may be said to have representation. As said in *Thomas* v. *Gay*, 169 U.S. 264, cited by defendants:

"Thus it has been held that personal allegiance has no necessary connection with the right of taxation; an alien may be taxed as well as a citizen. (Citing cases)

x

So, likewise, it is settled law that the property, both real and personal, of nonresidents may be lawfully subjected to the tax laws of the state in which they are situated."

Many taxes might be similarly characterized and it cannot be said that the license tax was the exercise of arbitrary power. It was levied uniformly on all lessees of these tribal trust lands.

We have considered all other contentions urged by defendants but think them without merit. The judgments in Nos. 15,969, 15,970 and 15,971 are therefore affirmed.

A true copy.

Attest: Robert C. Tucker

Clerk, U. S. Court of Appeals, Eighth Circuit.

(SEAL)

i.

APPENDIX II

(Judgment)

UNITED STATES COURT OF APPEALS
for the
EIGHTH CIRCUIT

No. 15967 — September Term, 1958.

Wednesday, October 15, 1958.

Albert J. Barta, John E. Barta and Charles K. Failing,
Appellants,

vs.

Oglala Sioux Tribe of the Pine Ridge Reservation of South Dakota, and James Iron Cloud.

Appeal from the United States District Court for the District of South Dakota.

This cause came on to be heard on the record from the United States District Court for the District of South Dakota, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the appeal from the District Court in this cause be, and it is hereby, dismissed.

October 15, 1958.

ii.

APPENDIX II, cont'd.

(Judgment)

UNITED STATES COURT OF APPEALS
for the
EIGHTH CIRCUIT

No. 15968 — September Term, 1958.

Wednesday, October 15, 1958.

Claire Coomes and A. R. Davies,

Appellants,

vs.

Oglala Sioux Tribe of the Pine Ridge Reservation of South Dakota, and James Iron Cloud.

Appeal from the United States District Court for the District of South Dakota.

This cause came on to be heard on the record from the United States District Court for the District of South Dakota, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the appeal from the said District Court in this cause be, and it is hereby, dismissed.

October 15, 1958.

iii.

APPENDIX II, cont'd.

(Judgment)

UNITED STATES COURT OF APPEALS
for the
EIGHTH CIRCUIT

No. 15969 — September Term, 1958.

Wednesday, October 15, 1958.

John Glover and Merton Glover,

Appellants,

vs.

United States of America.

Appeal from the United States District Court for the District of South Dakota.

This cause came on to be heard on the record from the United States District Court for the District of South Dakota, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

October 15, 1958.

iv.

APPENDIX II, cont'd.

(Judgment)

UNITED STATES COURT OF APPEALS
for the
EIGHTH CIRCUIT

No. 15970 — September Term, 1958.

Wednesday, October 15, 1958.

Jack Lewis and Marvin Spracklin,

Appellants,

vs.

United States of America.

Appeal from the United States District Court for the District of South Dakota.

This cause came on to be heard on the record from the United States District Court for the District of South Dakota, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

October 15, 1958.

v.

APPENDIX II, cont'd.

(Judgment)

UNITED STATES COURT OF APPEALS

for the

EIGHTH CIRCUIT

No. 15971 — September Term, 1958.

Wednesday, October 15, 1958.

Cyrus Porch and William Porch,

Appellants,

vs.

United States of America.

Appeal from the United States District Court for the District of South Dakota.

This cause came on to be heard on the record from the United States District Court for the District of South Dakota, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

October 15, 1958.

APPENDIX III

Title 25 USCA 2: *Duties of Commissioner.* The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations.

Title 25 USCA 9: *Regulations by President.* The President may prescribe such regulations as he may think fit for carrying into effect the various provivsions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs.

Title 25 USCA 262: *Persons permitted to trade with Indians.* Any person desiring to trade with the Indians on any Indian reservation shall, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of said Indians.

Title 25 USCA 400a: *Lease for mining purposes of land reserved for Agency or schools; disposition of proceeds; royalty.* The Secretary of the Interior is authorized under such rules and regulations as he may prescribe, to lease at public auction upon not less than thirty days' public notice for mining purposes land on any Indian reservation reserved for Indian agency or school purposes, in accordance with existing law applicable to other lands in such reservation, and the proceeds arising therefrom shall be deposited in the Treasury of the United States to the credit of the Indians for whose benefit the lands are reserved subject to appropriation by Congress for educational work among the Indians or in paying expenses of administration of agencies: *Provided,*

That a royalty of at least one-eighth shall be reserved in all leases.

Title 25, USCA 466. *Indian forestry units; rules and regulations.* The Secretary of the Interior is directed to make rules and regulations for the operation and management of Indian forestry units on the principle of sustained-yield management, to restrict the number of livestock grazed on Indian range units to the estimated carrying capacity of such ranges, and to promulgate such other rules and regulations as may be necessary to protect the range from deterioration, to prevent soil erosion, to assure full utilization of the range, and like purposes.

Title 25, USCA 476. *Organization of Indian tribes; constitution and bylaws; special election.* Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws when ratified as aforesaid and approved by the Secretary of the Interior shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the

approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress.

Constitution of the United States, Article V. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitution of the United States, Article XIV: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 28 USCA 73(a), *Appeal to a Court of Appeals. When and How Taken.* . . . The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and

is to be computed from the entry of any of the following orders made upon a timely motion under such rules: granting or denying a motion for judgment under Rule 50 (b): . . .

Title 28 USCA 77 (d). *Notice of Orders or Judgments.* Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon every party affected thereby who is not in default for failure to appear, and shall make a note in the docket of the mailing.

Title 28 USCA 1254 (1). *Courts of appeals: certiorari; appeal; certified questions.* By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

Title 28 USCA 1331. *Federal question: amount in controversy.* The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States.

Title 28 USCA 1345. *United States as plaintiff.* Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

FILE COPY

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DEC 30 1958
JAMES R. BROWNING, Clerk

No. 548

In the Supreme Court of the United States

OCTOBER TERM, 1958

ALBERT J. BARTA, JOHN E. BARTA, CHARLES K. FAILING, CLAIRE COOMES, A. R. DAVIES, JOHN GLOVER, MERTON GLOVER, JACK LEWIS, MARVIN SPRACKLIN, CYRUS PORCH and WILLIAM PORCH, PETITIONERS

v.

OGLALA SIOUX TRIBE OF THE PINE RIDGE RESERVATION OF SOUTH DAKOTA, and JAMES IRON CLOUD and UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 548

ALBERT J. BARTA, JOHN E. BARTA, CHARLES K. FAILING, CLAIRE COOMES, A. R. DAVIES, JOHN GLOVER, MERTON GLOVER, JACK LEWIS, MARVIN SPRACKLIN, CYRUS PORCH and WILLIAM PORCH, PETITIONERS

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The District Court did not write an opinion. The opinion of the Court of Appeals (Pet. 19-28) is reported at 259 F.2d 553.

JURISDICTION

The judgment of the Court of Appeals was entered on October 15, 1958 (Pet. 29-33). The peti-

tion for a writ of certiorari was filed on December 1, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the federal district court had jurisdiction over a suit by the United States to collect a tax imposed by an Indian tribe, organized under federal law, on the use of Indian Reservation lands by nonmembers of the tribe.

2. Whether a tribal tax imposed on nonmembers for the use of Indian Reservation lands violates the Fifth and Fourteenth Amendments to the United States Constitution.

STATEMENT

The facts in the three cases here involved in which the United States is a party [1] are relatively undisputed and may be summarized as follows:

The suits were instituted on March 5, 1957, by the United States on behalf of the Oglala Sioux Indian Tribe of the Pine Ridge Reservation, South Dakota. They were brought for the recovery of certain taxes levied by the tribal council upon nonmembers of the Tribe leasing lands within the reservation for grazing purposes. Pursuant to Section

[1] These three proceedings were consolidated for purposes of trial with two cases brought by, and in the name of, the Tribe for collection of the tax against other defendants. The five cases were consolidated in the Court of Appeals which dismissed the appeals as to the two cases brought by the Tribe for failure to file a timely notice of appeal (see Pet. 20-22).

16 of the Wheeler-Howard Act of June 18, 1934, 48 Stat. 987, as amended, 25 U.S.C. 476, the Oglala Sioux Tribe adopted a constitution, subsequently approved by the Secretary of the Interior, which authorized the tribal council "to levy taxes or license fees, subject to review by the Secretary of the Interior, upon nonmembers doing business within the reservation." Under this authority, the tribal council passed Resolution 147-50 which provides that nonmembers of the Tribe leasing land on the reservation were to pay to the Treasurer of the United States, for credit to the account of the Tribe, an assessment of three cents per acre per annum for the use of such land for grazing purposes in addition to grazing fees.[2] The assessment was made to establish a special fund to be used for general public purposes of the Tribe such as police protection, fire control, road construction and maintenance, etc. The resolution was duly approved by the Superintendent of the Bureau of Indian Affairs at the Pine Ridge Indian Agency and submitted to the Secretary of the Interior, who permitted it to go into effect.

Petitioners are nonmembers of the Oglala Sioux Tribe who have leased lands within the reservation for grazing purposes. Pursuant to Resolution 147-50, petitioners were assessed at the designated rate. However, they have refused to pay the tribal tax levied since November 1, 1953. In these actions

[2] The reason for a separate assessment in addition to grazing fees is the fact that within the Reservation there are trust allotments on which the grazing fee or rental is paid to the allottee rather than the Tribe.

brought to collect the tax, verdicts were directed for the plaintiff and judgments were entered on September 27, 1957. On appeal, the judgments were affirmed, the Court of Appeals rejecting unanimously petitioners' attack upon the jurisdiction of the District Court to entertain suit by the United States as well as their attacks on the validity of the taxes.

ARGUMENT

1. The jurisdiction of the District Court over these cases instituted by the United States on behalf of the Tribe was based on 28 U.S.C. 1345, which provides, in part, that "the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States * * *". It has long been firmly established that the United States has the legal standing to protect by suit the rights of Indian tribes, especially in their reservation lands. *Heckman* v. *United States*, 224 U.S. 413; *United States* v. *Candelaria*, 271 U.S. 432; *Alonzo* v. *United States* 249 F.2d 189 (C.A. 10), certiorari denied, 355 U.S. 940. This authority of the United States to sue on behalf of Indian tribes is so well settled that it is ordinarily not challenged, *e.g.*, *United States* v. *U.S. Fidelity Co.*, 309 U.S. 506; United *States* v. *West*, 232 F.2d 694 (C.A. 9), certiorari denied, 352 U.S. 834; *Moore* v. *United States*, 157 F. 2d 760 (C.A. 9), certiorari denied, 330 U.S. 827; *Hanson* v. *United States*, 153 F.2d 162 (C.A. 10); *United States* v. *Drumb*, 152 F.2d 821 (C.A. 10); *American Surety Co. of New York* v. *United States*, 112 F.2d 903 (C.A. 10). The early case of *Crabtree*

v. *Madden*, 54 Fed. 426 (C.A. 8), relied on by petitioners for the proposition that the federal court lacked jurisdiction (Pet. 10-11), was plainly overruled by the contrary decisions of this Court and the court below (including the ruling in the instant case). See the cases cited above, and *Maxey* v. *Wright*, 54 S.W. 807 (C.A. Ind. T.), affirmed without opinion, 105 Fed. 1003 (C.A. 8); *Buster* v. *Wright*, 135 Fed. 947 (C.A. 8).[3]

2. Petitioners' second contention challenges the validity of the tax by questioning, first, the power of the Tribe to levy the tax, and, secondly, the constitutionality of the tax. Neither point has any merit.

(a). The power of the Oglala Sioux Tribe to levy the disputed tax was unequivocally affirmed in *Iron Crow* v. *Oglala Sioux Tribe of the Pine Ridge Res.*, 231 F.2d 89 (C.A. 8). The courts below, in this case, have likewise correctly upheld the validity of the tax on the basis of settled and accepted principles of law announced by this Court. By treaty, many of the Indian tribes have had authority to admit onto the reservation those whom they choose and to impose conditions of entrance. Such a treaty authorizes the Oglala Sioux Tribe to impose restrictions on the presence of nonmembers within the reservation. In *Buster* v. *Wright*, 135 Fed. 947, the Eighth Circuit held that from this authority

[3] The United States also has here an interest deriving from the provision of the Tribal resolution that the assessment is to be paid to the Treasurer of the United States (*supra*, p. 3).

arose the power to tax nonmembers for the privilege of conducting their business on the reservation; the treaty provision forms the basis for distinguishing, for purposes of taxation, between members and nonmembers. See also *Morris* v. *Hitchcock*, 194 U.S. 384, 389.

(b). Petitioners contend that the tax violates their constitutional rights under the Fifth and the Fourteenth Amendments against discrimination. But whether or not the due process clauses of the Fifth and Fourteenth Amendments (and the equal protection clause of the Fourteenth Amendment) apply to legislation of the Indian tribes,[4] it seems clear that making a distinction for tax purposes between members of the Tribe and nonmembers is a reasonable one in view of the Tribe's power "to control the presence within the territory assigned to it of persons who might otherwise be regarded as intruders" (*Morris* v. *Hitchcock*, 194 U.S. 384, 389).

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[4] As the court below indicated (Pet. 26-27), there is authority for the general position that neither amendment is applicable to tribal action for the reason that the tribes are creatures of neither a state nor the federal government (cf. *Talton* v. *Mayes*, 163 U.S. 376; *Worcester* v. *Georgia*, 6 Pet. 515; *Slaughter-House Cases*, 16 Wall. 36; *Elk* v. *Wilkins*, 112 U.S. 94; *Morris* v. *Hitchcock*, 194 U.S. 384), but it is not clear whether this general proposition is correct with respect to the due process and equal protection clauses, or whether it applies only to other, specific, provisions of the Constitution such as the right to indictment.

CONCLUSION

The ruling below is plainly correct. There is no conflict of decision nor question calling for review by this Court. It is submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 548

ALBERT J. BARTA, JOHN E. BARTA and CHARLES K. FAILING, *Petitioners,*

v.

OGLALA SIOUX TRIBE OF THE PINE RIDGE RESERVATION OF SOUTH DAKOTA, and JAMES IRON CLOUD, *Respondents.*

CLAIRE COOMES and A. R. DAVIES, *Petitioners,*

v.

OGLALA SIOUX TRIBE OF THE PINE RIDGE RESERVATION OF SOUTH DAKOTA, and JAMES IRON CLOUD, *Respondents.*

JOHN GLOVER and MERTON GLOVER, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

JACK LEWIS and MARVIN SPRACKLIN, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

CYRUS PORCH and WILLIAM PORCH, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENTS OGLALA SIOUX TRIBE AND JAMES IRON CLOUD IN OPPOSITION

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UNITED STATES OF AMERICA, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENTS OGLALA SIOUX TRIBE AND JAMES IRON CLOUD IN OPPOSITION

The respondents Oglala Sioux Tribe and James Iron Cloud oppose the grant of the petition for a writ of certiorari in this case since the decision below is clearly

correct, presents no novel or important question of federal law, and involves no conflict of decisions.

OPINIONS BELOW

The opinion of the Court of Appeals has now been reported at 259 F. 2d 533.

Petitioners failed to refer to and to append to their petition the opinion of the District Court, as required by Rule 23(1)(a). That opinion was reported at 146 F. Supp. 917.

QUESTIONS PRESENTED

Petitioners have presented five questions, only the first two of which relate to the suits brought by respondents Oglala Sioux Tribe and James Iron Cloud. The first of these raises the question of the correctness of the dismissal of the appeals on the ground that they were filed late. The second question concerns the jurisdiction of the District Court over the cases brought by the Oglala Sioux Tribe. That question was not reached by the Court of Appeals. Question 2 would, therefore, be reached only if this Court grants the writ of certiorari as to Question 1 and reverses the Court of Appeals on that question. If the Court were to do that, precedent would dictate that the cases be returned to the Court of Appeals for further consideration.

The only presently relevant question as to the respondents Oglala Sioux Tribe and James Iron Cloud is, therefore, whether the Court of Appeals properly dismissed petitioners' appeals as out of time.

STATEMENT OF THE CASE

Pursuant to the provisions of the Indian Reorganization Act, 48 Stat. 937; 25 U.S.C. § 476, the Oglala Sioux Tribe in 1935 organized a tribal government. That government functions under a tribal constitution, which has been approved by the Secretary of the Interior. Under the terms of the constitution, the Oglala Sioux Tribe discharges certain responsibilities of local government, including the maintenance of a tribal court, a tribal police force and a tribal jail.

The bulk of tribal services is financed out of tribal lease rental income. To supplement that income, however, the Tribe levies certain fees and license taxes. One such tax, which is used to support the tribal law and order system, is a license tax levied on non-members for the privilege of leasing trust land on the Pine Ridge Indian Reservation. This tax supplements the contributions of the tribal membership to the financial support of the tribal government.

Petitioners have been lessees of trust land on the Pine Ridge Indian Reservation. They entered into lease contracts knowing of the existence of the tax and, in fact, paid the tax until 1953. Beginning on November 1, 1953, they refused to pay the tax, asserting that it was invalid. After the validity of the tax was upheld in a test case, *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956), *affirming* 129 F. Supp. 15 (D.S.D. 1955), the Tribe brought suits against two lessees to collect delinquent taxes. Three other lessees, who owed less than the jurisdictional amount of $3,000, were sued by the United States on behalf of the Tribe, so as to bring all five suits in the Federal Court and permit disposition at a single trial.

The five suits were consolidated for trial and tried before a jury. They ended in directed verdicts for plaintiffs.

Petitioners filed timely motions for new trials. A hearing was had on these motions on October 10, 1957, at the conclusion of which the Court declared: "The motions will be denied." Immediately thereafter, on October 10, 1957, the Court ordered the entry of judgment in the cases brought by the Tribe. The docket entries for that day reflect the denial of the motions for a new trial and the entry of judgment. Twenty days later, on October 30, 1957, a formal order denying the motions for a new trial in the tribal cases was filed. The notices of appeal in all cases were filed on November 29, 1957.

The Court of Appeals dismissed the appeals in the tribal cases for lack of jurisdiction, holding that the time for appeal had begun to run on October 10, 1957, and that the notices of appeal filed on November 29, 1957 were thus filed late.

The Court of Appeals further affirmed the decisions of the District Court in the three cases brought by the United States.

ARGUMENT

A. THE TRIBAL CASES

1. The Court of Appeals correctly applied the rule laid down by this Court in the Schaefer Brewing Co. case

As already indicated, the appeals in the tribal cases were dismissed on the ground that the notices of appeal were filed late, more than thirty days after October 10, 1957.

The judgments of the District Court, entered on October 10, were precise in stating the principal sum due as well as all interest and penalties. Respondents

have conceded that these judgments were final and, in their notices of appeal, have identified the judgments of October 10 as the judgments appealed from. Therefore the issue here is not whether the judgments signed and entered on October 10, 1957 were final judgments from which appeals might be taken within thirty days. The finality of the October 10 judgments is undisputed.

The only issue involved in this first portion of the petition is whether the formal orders denying the motions for a new trial, filed on October 30, 1957, extended the time for filing the appeals. The Court below held that the formal orders merely recapitulated the actions taken twenty days earlier and did not extend the time to appeal.

In *United States* v. *Schaefer Brewing Co.*, 356 U.S. 227 (1958), this Court clearly laid down the applicable rule. The rule is that the time for appeal starts running with some action of the District Court which is clearly its "final act in the case." 356 U.S. at 232. A subsequent, more formal order, which, under the Federal Rules of Civil Procedure, is not really necessary, does not extend the time to appeal. See 356 U.S. at 233.

In the instant case the District Court had disposed of all pending motions on October 10 and entries had been made to that effect. The Court had then signed the judgments, which specify both principal and interest. It was clearly its final act in the case. The subsequent formal order was unnecessary and did not cause the time for appeal to start running anew.[1]

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[1] A case on all fours with the instant one is *Mosier* v. *Federal Reserve Bank of New York*, 132 F. 2d 710 (2d Cir. 1942). See also *Agostino* v. *Ellamar Packing Co.*, 191 F. 2d 576 (9th Cir. 1951). *Cf. J. E. Haddock, Ltd.* v. *Pillsbury*, 155 F. 2d 820 (9th Cir.), cert. denied, 329 U.S. 716 (1946); *Woods* v. *Nicholas*, 163 F. 2d 615 (10th Cir. 1947).

Respondents cite *Partridge* v. *Presley*, 189 F.2d 645 (D.C. Cir.), *cert. denied*, 342 U.S. 850 (1951), to suggest a conflict of circuits. But the *Partridge* case is wholly in keeping with the decision below. In the *Partridge* case, as Judge Wilbur K. Miller pointed out, "nothing appears to indicate a hearing was had on the motion [for a new trial] prior to the judgment . . . nor even that the trial judge was then aware of the pendency of the motion for a new trial." 189 F.2d at 647. The crucial difference in the instant case is that the motions for a new trial were not only known to the Court but had been heard and denied when the October 10 judgments were entered.

There is thus no conflict of circuits concerning this matter. The *Schaefer Brewing* case, decided earlier this year, is clearly controlling and was followed by the Court below. No certiorari question has been presented.

B. THE SUITS OF THE UNITED STATES

1. The United States had an interest in these actions which authorized it to maintain the suits

When petitioners attack the suits brought by the United States on the ground that the court lacked jurisdiction, they do not mean what they say. As the suits were brought by the United States, jurisdiction was clearly obtained under the provisions of 28 U.S.C. § 1345. What petitioners really appear to argue is that the United States had no standing to bring these actions on behalf of the Oglala Sioux Tribe.

This question was fully discussed by Felix S. Cohen, whom this Court has recognized as "an acknowledged expert in Indian law,"[2] in his *Handbook of Federal Indian Law*, p. 367:

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[2] *Squire* v. *Capoeman*, 351 U.S. 1, 8-9 (1956).

"A pecuniary interest of the United States itself need not exist in cases involving restricted Indian lands or land in which the United States is trustee. It is well settled that the United States, by virtue of its peculiar relations with the Indians—often called 'guardianship'—or as trustee of their property, has the capacity and the duty to effectuate Government policies by protecting and enforcing their rights in property held by it as trustee, or by the Indians themselves in fee simple, subject to restrictions on alienation.

"The United States acts in behalf of itself and as trustee or guardian for the Indians. When proceeding on its own behalf the United States is (a) protecting its guardianship over the Indians, and (b) removing unlawful obstacles to the fulfillment of its obligations. In *United States* v. *Fitzgerald* [201 Fed. 295 (C.C.A. 8, 1912)] the Court said:

> " 'The United States may lawfully maintain suits in its own courts to prevent interference with the means it adopts to exercise its powers of government and to carry into effect its policies. It may maintain such suits, although it has no pecuniary interest in the subject-matter thereof, for the purpose of protecting and enforcing its governmental rights and to aid in the execution of its governmental policies. (p. 296-297)' "

In support of this proposition the *Handbook* cites, *inter alia*, the decisions of this Court in *Heckman* v. *United States*, 224 U.S. 413 (1912) and *United States* v. *Candelaria*, 271 U.S. 432 (1926).

None of the cases cited by petitioners are in point, as none of them involve the relationship and responsibility of the United States to Indian tribes. In the

instant case, by petitioners' own admission, the cases arose from their leasing of lands held by the United States in trust for Indians. It has been uniformly held that in a situation such as this one the United States may sue on behalf of the Indian tribe. The court below was thus clearly correct in holding as it did. Petitioners have cited nothing that would justify upsetting this well-established principle, nor have they asserted any valid ground why this Court should consider reviewing it.

2. The Court of Appeals correctly held that the tribal tax is valid

The tax in issue here was a license tax levied on the privilege of doing business on the Pine Ridge Indian Reservation. It is very similar to the tax sustained by this Court in *Morris* v. *Hitchcock*, 194 U.S. 384 (1904). See also *Buster* v. *Wright*, 135 Fed. 947 (8th Cir.), *app. dismissed* 203 U.S. 599 (1906). The very tribal tax here in issue was sustained in *Iron Crow* v. *Oglala Sioux Tribe*, *supra*.

The origin of the tax in issue here was described in *Iron Crow* v. *Ogallala Sioux Tribe*, 129 F. Supp. 15, 24-25 (D.S.D. 1955) in the following terms:

> "Pursuant to the provisions of the Indian Reorganization Act the Ogallala Sioux Tribe adopted on December 14, 1935, a tribal constitution which was approved by the Secretary of the Interior on January 15, 1936. Article IV, Sec. 1(h) of the constitution authorizes the Ogallala Sioux Tribal Council 'to levy taxes upon members of the Ogallala Sioux Tribe and to require the performance of community labor in lieu thereof, and to levy taxes or license fees, subject to review by the Secretary of the Interior, upon non-members

doing business within the reservation.' . . . Because of the need for additional revenue the Tribal Council in April, 1949, passed Resolution No. 34-49, levying an assessment on leases of trust land by non-members. In April 1950 it was amended (No. 147-50) to provide that non-members leasing trust land on the Pine Ridge Reservation were to pay an assessment of 3¢ per acre per annum for grazing land, and 15¢ per acre per annum for farm land. This resolution and the amendment thereto were duly approved by the Indian Bureau Superintendent and submitted to the Secretary of the Interior, who permitted them to go into effect."

Upholding the tax the Court of Appeals observed in that case:

"We conclude from the original precept of tribal sovereignty and the fact that the power of the Oglala Sioux Tribe to impose the tax or license in question has not been pretermitted by any federal statute or agency ruling thereunder, but, to the contrary, has been implemented by the Indian Reorganization Act, supra, that such power still exists." 231 F.2d at 99.

The decision below as well as the decision in the *Iron Crow* case are clearly in keeping with the decision of this Court in *Morris* v. *Hitchcock, supra.* None of the decisions cited by petitioners have even a remote bearing on the issue involved in this case. The arguments relating to "political, social, and economical" changes, on the basis of which prior decisions should be reversed, would be appropriate, if they were justified, only when addressed to the Congress. As this Court observed in *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 565 (1903):

> "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the Government."

The contention was made by petitioners in the courts below and is again made in this Court that the tax is unconstitutional. But no argument was advanced at any stage of the proceedings which would distinguish the tax in *Morris* v. *Hitchcock*, *supra*, from the tax involved in this case. In *Morris* v. *Hitchcock*, this Court held that a Chickasaw tax on non-citizens of the Chickasaw Nation holding livestock within Chickasaw territory "was not the exercise of arbitrary power, as claimed, and that neither the act nor the regulations in any respect violate the Constitution of the United States." 194 U.S. at 393.

In the instant case any fact issues as to petitioners' leasing of the land, the acreage leased, and non-payment of the tax were eliminated in the pre-trial stage. By direction of the District Court the essential issue considered at the trial was the constitutionality of the tax. Out of an abundance of caution the District Court, rather than requiring petitioners to prove the tax unconstitutional, placed the burden of proving constitutionality on the respondents. Complying with the instructions of the Court, respondents submitted proof at the trial (1) that petitioners benefited from the law and order services rendered by the Tribe, (2) that the tax on non-members was merely one of a number of sources of Tribal revenue, most of the other sources being direct or indirect contributions by the Tribal membership. As respondents' proof was uncontradicted, the District Court found the tax constitutionally

valid and then directed verdicts for respondents.[3] Its action was, as already indicated, clearly in line with the decision of this Court in *Morris* v. *Hitchcock*.

Thus this aspect of the case, too, was correctly decided and no reason has been shown why review by this Court should be deemed appropriate.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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December 31, 1958

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[3] In directing the verdicts, the District Court declared, *inter alia:* "The Court can see nothing arbitrary or capricious about the size of this tax . . . The evidence in this case shows that the great portion of this money was used for law and order, maintaining the tribal courts and tribal police and that sort of thing, and whether the defendants feel that they get any direct benefit from that or not, the Court feels that they do, the same as they get benefit from the law and order maintained by the state and Federal government."